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Author(s): FAZLUR RAHMAN
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THE CONCEPT OF *ḤADD* IN ISLAMIC LAW

FAZLUR RAHMAN

Note: This short article does not seek to cover all the details of the problem of *ḥadd* as discussed by Muslim jurists but confines itself to the question of its definition. The Ḥadīth material on this has not been discussed because it does not yield any explicit definition, because it runs parallel to Fiqh and is radically different from the Qur'ān and because this, in turn, creates a strong presumption at any rate that the Ḥadīth on the subject is essentially a result of Fiqh development.

The word "*ḥadd*" in the Arabic language, when used as an infinitive, means "to separate" or "to prevent (one thing from intruding into another)." Therefore, when used as a noun, it means "that which separates" or "that which prevents (something or someone from intruding into another)".[1] The idea of a "limit" (which separates one thing from another) is, therefore, the most basic meaning of *ḥadd*. As we shall presently see, it is this very idea that has been repeatedly expressed in the Qur'ān in a moral sense when the Qur'ān speaks of *ḥudūd Allāh* or "limits (prescribed by) God" which "you may not transgress". When, however, we compare this Qur'ānic usage with the use of the term in Islamic law and legal Ḥadīth, we notice that a basic development has taken place: we find that the term *ḥadd* has been reserved to signify a punishment of an unchangeable quantum primarily laid down in the Qur'ān. The concept of the "separating or preventing limit" of the Qur'ān is thereby replaced by the idea of "fixed punishment". In order to gauge the importance of this legal development, it is first necessary to study more closely the use of the term in the Qur'ān.

I

In II, 229-30, the Qur'ān says, "Divorce (may be given) twice; thereafter either retain (the wife) according to good custom or let (her) go with good treatment. And it is not lawful for you to take anything you had given them (i.e. to your wives)—except in cases where they (i.e. the husband and the wife) fear that they would not be able to observe the limits of God (*ḥudūd Allāh*). Thus, if you fear that they will not be able to observe the limits of God (*ḥudūd*

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Allāh) there is no harm if she surrenders something to him. These are God's limits (*ḥudūd Allāh*) : do not transgress them ; and whosoever transgresses God's limits (*ḥudūd Allāh*), those are the unjust ones. But if he (the husband) divorces her, she will not be lawful to him thereafter until she marries another husband. If he (the second husband) divorces her, there is no harm if the two return to each other if they think they can observe the limits of God (*ḥudūd Allāh*). These are the limits of God (*ḥudūd Allāh*) which He explains to people who know". It will be obvious to any reader that the term *ḥudūd Allāh*, employed six times in these two verses, does not have the same meaning except when that meaning is generalized to mean "good" and "bad" acts and attitudes. Whereas this term has been employed, in its uses 3 and 6 above, to refer to the specific injunctions contained in the body of these two verses themselves, uses 1, 2 and 5 do not refer to anything specifically stated, let alone enjoined either here or, indeed, elsewhere in the Qur'ān. That is to say, when the Qur'ān speaks of "observing the limits of God" in these verses, it states neither here nor elsewhere specifically what precisely these "limits" are. When talking of husband-wife relationship, the Qur'ān often demands a conduct which is *bi'l-ma'rūf* i.e. in accord with good custom. We are not asserting that the Qur'ān nowhere makes any statement or lays down any injunction about any aspect of marital life ; what we are saying is that such statements and/or injunctions cannot be the referent of the term "*ḥudūd Allāh*" under discussion here, for the term here is something general and must refer to the total conduct of marital life which is comprehended only by the term "*ma'rūf*" or "good custom." The content of good custom, then, constitutes the content of *ḥudūd Allāh* for the conduct of marital life.

Before we go any further, let us pause to consider some of the consequences that follow from this position. First, it will be noticed that the term *ḥadd* or *ḥudūd* in this context has not only no reference to punishments—let alone any which may be "quantitatively invariable"—but not even to any legal injunctions. Indeed, it does not refer to any statements at all. The Qur'ānic usage refers, therefore, to a *moral* situation which, of course, may have legal implications. Secondly, and equally importantly, the content of "good custom," far from being invariable, is very variable, indeed. The "good custom" of seventh century Arabia is certainly not identical with the "good custom" of present-day Java, for example.

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The content of *ḥudūd Allāh* will, therefore, be something manifestly variable although the universalized principles of "good" and "bad" are, of course, constant. The same conclusion that the term "*ḥadd Allāh*" refers to a general distinction between "good" and "bad," flows from IX, 112: "Those who repent, worship (or serve) God and praise Him, those who go forth (in *Jihād*) and perform *rukū'* and *sujūd* (in prayers), command good and forbid evil and preserve the limits of God (*ḥudūd Allāh*)...." Here, again, *ḥudūd Allāh* obviously refers to that which is generally good and righteous for whatever is good and righteous may be assumed to be ordained by God whether it has been explicitly stated or not. In the same *Sūrah*, the Qur'ān, severely criticizing the perfidy of certain Beduin tribes who had unilaterally broken defence pacts with Muslims at a critical stage, declares, "The Beduins are the most intense in their infidelity and hypocrisy and are the most unfit to know the limits that God has sent down (*ḥudūda mā anzala Allāhu*) to His Prophet...." (IX, 97). Although the phrase "the limits that God has sent down to His Prophet," must still have a general meaning here, since it refers to the whole complex of the Qur'ānic-Prophetic teaching, nevertheless, in this verse there must be seen a strong allusion to the Beduin tribes' non-participation in *Jihād*, despite definite arrangements to this effect (which, however, are nowhere stated in the Qur'ān). For, in the very next verse, the Qur'ān explicitly mentions this: "Among Beduins there are those who regard expenditure (in *Jihād*) as a fine and look forward to the fortunes of war turning against you" (IX, 98).

We now come to four instances where "*ḥudūd Allāh*" refers to definite and stated injunctions about the regulation of human behaviour. The first of these four cases (II, 187) occurs after the Qur'ān has laid down certain regulations about the observance of fast and more particularly about sexual behaviour during fast. The Qur'ān then says, "These are the limits of God, do not approach them. So does God explain His signs to people that they may guard themselves (against wrong)". Again, in LXV, 1, after giving instructions in connection with the procedure of divorce and admonishing that people should "fear God" and should not maltreat divorced women by turning them out of their homes during the waiting period, proclaims all these instructions to be "limits of God" the violation of which will bring harm to the violator himself. But a very interesting example of the use of

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this expression occurs in IV, 12-13 where, after giving general admonition about being kind to the orphans and the needy and giving certain specific instructions about the apportionment of inheritance, the Qur'ān goes on, "These are the limits of God; whosoever obeys God and His Prophet, God will give him entry into Paradise underneath which rivers flow—and this is a great success. But whosoever disobeys God and His Prophet and transgresses His limits, He will make him enter the Fire wherein he shall abide and (this) for him is a humiliating torment". The point to note about these verses is that although the greater part of the injunctions preceding them is specific, nevertheless, their disobedience is threatened with punishment *in the hereafter and not in this world.* Conversely, obedience to them entails reward in the hereafter. These facts should compel us to pause and think how little concerned the Qur'ān is about the purely legal side and how much more and primarily with setting the moral tone of the Community. The legal side has undoubtedly to be done justice to and an adequate law has to be developed. But it is left to the Community to formulate this law in the light and moral spirit of the Qur'ān which itself shows little tendency to lay down hard and fast laws. And doubly mistaken are those who claim to take the law of God into their own hands and seek to implement it literally. Firstly, it is obvious that they understand little of the Qur'ān; secondly, the formulation of the law is not vested in any individual or a group but in the Community as a whole through the institution of the *Shūrā*.

The fourth example is the only one in the Qur'ān where the term "*ḥudūd Allāh*" is accompanied, among other things, by specific forms of what might be called punishments but which are, strictly speaking, only *kaffārah* or atonement. The question under discussion is the pre-Islamic practice of *ẓihār* whereby a husband declared his wife to be sexually illegal for him "as his mother". The Qur'ān, in LVIII, 2, declares the utterance of *ẓihār* to be a "reprobate falsehood" and, after adding that God, however, is gracious and pardoning, continues, "Those men who make a declaration of *ẓihār* about their wives and repeat the utterance, must emancipate a slave before the two can touch each other (again). This is what you are being admonished to do and God is well aware of your deeds. If someone does not have (a slave to emancipate), he should fast (from dawn to sunset) consecutively

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for two months before the two touch each other. But if he is unable to do so, he is to feed sixty poor people. This is in order that you may (properly) believe in God and His Prophet ; and these are God's limits and for disbelievers is a painful torture".

There are certain points which must be considered with regard to this verse which is the only one, we repeat, mentioning any sanctions in connection with "*ḥudūd Allāh*". First, these sanctions are not properly legal but constitute *kaffārah* or atonement. In fact, this question is to be raised generally about all Qur'ānic "legislation" and punishments connected with them, since it is obvious throughout the Qur'ān that its real concern is with the religio-moral health of the Community. The employment of such concepts as *tawbah* even where specific punishments are mentioned makes the character of the Qur'ānic "legislation" all the more religious rather than legal. This means once again that law proper has to be deduced from the Qur'ān rather than this law being found there ready-made. Secondly, by suggesting alternative punishments for *ẓihār*, the Qur'ān seems to remove the ground from beneath the legal theory that "*ḥudūd Allāh* signify punishments of invariable, fixed quantity". Indeed, from these verses of the Qur'ān the conclusion is inevitable that Muslims are being shown the way to vary punishments to suit conditions. For, if the Qur'ān has said that the punishment of emancipating a slave, if not applicable, may be substituted by a sixty days' fast which, if not feasible, may itself be varied to the feeding of sixty poor persons, then, surely, this can be further varied for it is equally possible that a person guilty of *ẓihār* may not be in a position to feed sixty people. The nature of the case demands that the punishment should be further variable.

II

In the earliest extant Fiqh-Ḥadīth literature which dates from the second century (A.H.), however, we already find the use of the term "*ḥadd Allāh*" as well-established in the sense of certain "prescribed punishments" primarily fixed in the Qur'ān. It would seem that the *Fuqahā'* wanted to mark off the punishments laid down in the Qur'ān—as having been ordained by God—from all other punishments by giving them the respective names of "*ḥadd Allāh*" and "*ta'zīr*" and declaring the former as invariable in quantity. There is a Tradition quoted by Mālik in *al-Muwaṭṭa'* which lends

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support to this view and wherein the Prophet is reported to have spoken of these punishments (more specifically, the punishment of a hundred lashes for adultery) as "prescriptions or ordinances of God (*Kitāb Allāh*)":

"O people! restrain yourselves from (violating) the 'limits of God'... Whosoever brings his crime to our notice, we shall implement the prescription of God on him."[2]

The picture, however, is not as simple and clear-cut as this. Indeed, there are few topics in the classical law-works wherein definitions are so unsatisfactory and unclear as that of *ḥadd*. From the earliest times the concept of *ḥadd* was bound up with quite a different question and it is this which has primarily complicated the issue. This question concerns the division of the obligations of a person to God and fellow-men. The former are called *ḥaqq* (plural, *ḥuqūq*) *Allāh* and the latter *ḥaqq al-'ibād* or "rights of God and rights of men". The earlier texts seem to identify *ḥadd* with violation of a "right of God" and oppose it to "injustices done to men (*maẓālim al-'ibād*)." Muḥammad al-Shaybānī says: "If they (i.e. rebels) ask for peace on the condition that no claims shall be made against them on that score (i.e. about the property of Muslims they may have confiscated), the Muslim ruler may not make peace with them on that condition. Even if he does, he may not fulfil his promise but should order them (after surrender) to return the property of a Muslim or a power in treaty with Muslims that may be found intact on them. He can only forgive them the *ḥudūd* which pertain to God (but not the violations of the "rights of men" i.e. like confiscation of property). In the same category is the case of an apostate who violates the rights of men (*aṣāba shay'an min mā fīhi maẓālim al-'ibād*), fortifies himself in a fortress of the enemy and seeks peace (amnesty) on the condition that he will throw open the fortress to the Muslims if property (confiscated by him from Muslims) is left intact (i.e. the Muslim ruler cannot give him peace on this condition). However, if such a person has already spent the property but has not killed anyone, the ruler may, considering the welfare of the Muslims, grant him that, provided the ruler then restores the property of the Muslims from the booty. But the ruler may not forgive retaliation or punishment due to a false accusation of adultery (which the peace-seeker may have been guilty of), for the ruler cannot compensate the Muslims for injustices done to their rights (*maẓālim al-Muslimīn*) in these

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cases".[3]

We meet the same distinction between "*ḥadd*-for-God (*ḥadd l'illāh*) and private claims in Mālik's *al-Muwaṭṭa'*: "If a person confesses adultery against himself but then retracts from his confession saying, 'I had confessed because of such-and-such circumstance' (and he specifies the reason), then this plea shall be accepted from him and *ḥadd* shall not be inflicted on him. This is because *ḥadd*-which-is-for-God can be inflicted only in two ways, either ....".[4]

It is clear, then, that from the very beginning a fundamental division regarding punishments was at work—those, namely, for violation of the claims of Allāh and those for private injuries. Al-Shaybānī, indeed, employs even the term "right of God" (*ḥaqq l'illāh*): "Granting of amnesty means undertaking to desist from killing or capturing them (i.e. the enemy) as a right of Allāh."[5] There are thus "rights of Allāh" and "rights or claims of men" and *ḥadd Allāh* is a punishment given for violation of a *ḥaqq Allāh* or the right of Allāh. This division obviously cuts across the categorization given by us earlier, viz. that punishments prescribed by God in the Qur'ān are *ḥudūd Allāh*. For, to begin with, there are crimes and their punishments mentioned in the Qur'ān, which, according to the second division belong not to the sphere of Allāh's rights but men's rights—for example, the crime of murder and its punishment. Conversely, there are punishments which, according to the *Fuqahā'*, rank as "*ḥudūd Allāh*" *par excellence*, such as the punishment for drinking or becoming intoxicated, which were not only not fixed or mentioned by the Qur'ān but were not fixed even by the Prophet's *Sunnah*.

Before enquiring into the possible basis of this division, it should be noted that in early literature there is a great oscillation concerning the actual classification of individual crimes and punishments. On the basis of somewhat lengthy quotation from al-Shaybānī cited above, taking away of property (whether by violence or not), murder and false accusation of adultery appear as infringements of human rights and hence unpardonable by the Muslim State, since the State may pardon only violations of Allāh's rights under certain circumstances. But in the following statement of al-Shaybānī, taking away of property by stealth or violence is declared to be a claim of God and hence pardonable like adultery or drinking and intoxication: "If a Muslim commits a crime against Allah (*ḥadd l'illāh*) like adultery, theft or robbery . . .

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then comes back repenting, all these crimes shall be forgiven him ....If a Muslim is gulity of drinking and intoxication....he shall not be punished for this."[6]

It is clear that unless the basis of the division of crimes into those against rights of Allāh and rights of men becomes clear, there can be no satisfactory answer to this confusion. For, the answer that theft and false accusation of adultery are both crimes against God and crimes against men is itself unsatisfactory unless it is clarified as to what exactly constitutes a crime against God's rights and human rights respectively. It is here, indeed, that the root of the confusion lies, for there is absolutely no satisfactory definition of what is a right of Allāh and what a right of man and hence what constitutes their violation. This confusion appears in a typically concentrated form, for example, in the standard Ḥanafī law-work *al-Hidāyah* of Burhān al-Dīn al-Marghīnānī (d. 593 A.H.). "*Ḥadd* in Sharī'ah means a quantitatively fixed punishment (in violation) of a right of Allah—so that retaliation for murder cannot be called a *ḥadd* because it is a right of human contract, nor can *ta'zīr* (be included in *ḥadd*) for it is not quantitatively fixed. The real purpose of the ordaining of *ḥudūd* is to deter from such acts as harm people".[7] 'Aynī', the famous commentator of *al-Hidāyah*, elaborates further, saying that "harm to people" means "harm to their persons as in adultery, or to their honour as in false accusation of adultery or to their property as in the case of theft."[8]

From this it appears that the *ḥudūd* or "fixed punishments" are given in violation of those rights of Allah which are automatically violated when certain rights of men are violated and that violation of these rights of men *ipso facto* constitutes violation of rights of Allāh. From this account it emerges that the rights of Allāh in question are not something distinct from rights of men but are identical with them. This view is supported also by the type of theory succinctly stated, for example, by the late Rector of al-Azhar, Shaykh Maḥmūd Shaltūt that Allāh's rights are to be understood as meaning those human rights which belong to the society as a whole in contradistinction to rights which belong to individuals as such and that violation of society's rights *ipso facto* constitutes and means violation of Allāh's rights entailing quantitatively fixed punishments.[9] This theory is attractive because it declares that punishable *ḥudūd* are only those crimes which are committed against society and that if there are rights exclusively belonging to

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Allāh, they cannot be punished by men. In the first place, however, this contradicts what the *Fuqahā'* have actually held for, although it is impossible to arrive at any plausible definition of the rights of Allāh or the limits of Allah from what they have stated, yet the *Fuqahā*'s statements make it absolutely clear that rights of Allāh are different from rights of men. Secondly, prayer, for example, is universally recognized by them as a right of Allāh exclusively the violation of which must be punished. It would be extremely far-fetched to argue that not praying is a crime against society. Thirdly, the "*ḥudūd Allāh*" *par excellence* for the *Fuqahā'* are adultery, wine-drinking (or being drunk), theft and robbery. Now, while theft and robbery are genuine crimes against society, it is difficult to see how wine-drinking, for example, is a crime against society in general or even against any individual (unless, of course, being drunk creates a positive danger for others).

But the most peculiar situation created by the classical legal interpretation of the Qur'ān and apparently equally accepted by the school represented by Shaykh Shaltūt is that murder is supposed to be exclusively a violation of an individual's rights—not of "Allāh's rights", to use the classical legal terminology or, to use Shaykh Shaltūt's terminology, against society. On this question, the Qur'ānic statement (in II, 178 ff.) has been taken as exclusively relevant, which essentially confirms the pre-Islamic tribal custom and allows either retaliation for murder or settlement in terms of blood-money (*diyah*) or pardon (which is even encouraged by the Qur'ān). The important Qur'ānic statement (V, 32) which makes of murder a crime against entire humanity was conveniently forgotten : "It was because of this (i.e. the wilful murder by a son of Adam of his brother) that We laid it down for the children of Israel that whosoever kills a person who has not committed a murder or without war, it is as though he has slain all mankind and whosoever restores one life it is as though he has restored the life of all humanity." It is one of the strangest facts of our legal history that such a categorical statement of the Qur'ān was never even discussed in the context of the crime of murder. It cannot be said that this was only for the Jews, for the Qur'ān is explicitly linking up its statement with the first murder ever committed on earth. How can, then, murder remain only a private claim ?

We have thus seen that the definitions of *ḥadd* and *ḥaqq Allāh* given in the *Hidāyah* and also accepted by a large number of

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jurists and rationalized as crimes against society by the type of theory represented by the late Shaykh Shaltūt in our own time cannot stand as they are. Shaykh Shaltūt's interpretation, if accepted, would, of course, constitute an excellent point of departure for a reform of this legal doctrine and a complete reclassification of all crimes. This theory, let us repeat, says that Allah's rights, where their violation is punishable, are to be identified with the rights of society as against the rights of an individual. If this view were accepted, several crimes which have been regarded as *ḥudūd Allāh* since the dawn of Fiqh, would cease to be so regarded since they can hardly be described as crimes against society and, conversely, some crimes—for example murder —which have been regarded by the *Fuqahā'* as a matter for private settlement, would have to be reidentified as crimes against society. We shall continue our search for such a basis in the Fiqh itself.

The common run of jurists, no doubt, make a radical distinction between the rights of Allāh and the rights of men without defining what a right of Allāh is, as we have said before. However, a far more rational line on the question is adopted by 'Izz al-Dīn 'Abd al-Salām al-Sulamī, a bold and original jurist of the Shāfi'ī school (d. 660 A.H.) in his work *Qawā'id al-Aḥkām*. In so far as he bases his entire theory of law on the principle of "preventing harm to people and bringing welfare to them (*ḍaf' ḍarar* [or *mafsadah*] *'an al-nās wa jalb manfa'ah* [or *maṣlaḥah*] *lahum*)," his approach is thoroughly humanitarian and in this he can be definitely regarded as a predecessor of Shāh Walīy Allāh. Since all *ḥadd*-punishments are meant to deter from mischief and harm to people, rights of Allāh must be construed as rights of society. His discussion of murder is illuminating. He regards murder as the highest of crimes and says that inflicting punishment for murder was left to the next of kin because it is most unlikely that the murderer would be left unpunished in that case since it is the next of kin who feel most hurt by this heinous crime. He adds that what shows that murder is not simply a crime against an individual is the fact that no individual can make his own life lawful for others (let alone other people's lives to himself). Again, forgiveness on the part of the next of kin of the murdered person is allowed simply because its chances are negligible. The fact that infliction of the punishment for adultery is not left up to the relatives of the woman offended against, nor that of theft up to the person whose property

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has been stolen (but the state has been made responsible for this) —says our author—is because the former may not even raise the question out of a sense of shame and the latter may mercifully forgive the thieves out of pity for them as they are wont to do.[10] (A society where property-owners are merciful to poor thieves does not exist today, of course !).

'Izz al-Dīn ibn 'Abd al-Salām's views on certain crimes are daring in the history of Sunnī law. He rejects the punishment by stoning to death of a married person guilty of adultery and rejects the traditional material regarding it as unreliable. Similarly, he rejects certain alleged forms of interest accepted unanimously by the *Fuqahā'* as utterly unintelligible : "I do not understand the kind of mischief (*mafsadah*) which might necessitate the stoning to death of a married adulterer. On this question things have been alleged which I cannot accept. Similarly, I have not found anything reliable concerning the mischief wrought by (certain forms of) *ribā* which might necessitate considering them among the grave sins (*kabā'ir*). A person who sells one thousand (gold) *dīnārs* for a single (silver) *dirham*, his transaction is considered valid . . . but a person who sells one measure of barley for a thousand measures of wheat . . . or sells a *dīnār* or *dirham* each with its equal but, may be, only on a very short-term loan, his transaction is considered invalid. In none of these forms (of prohibition) there appears any intelligible meaning which may be considered worthwhile."[11]

III

We have seen above that the theory which interprets Allah's rights and rights of men simply as rights of society and rights of individuals respectively faces several formidable difficulties. This theory, of which we took Shaykh Shaltūt as a neat modern representative, is itself, of course, not modern. Al-Taftāzānī (d. 660 A.H.), among others, propounds it very explicitly : "By a right of Allah is meant that which is concerned with common good without being particular to an individual. It is attributed to Allah because of its great importance and its universal benefit. Otherwise, in so far as their creation is concerned, all rights (i.e. whether social or individual) are attributable to God, while as far as their harm or benefit is concerned, God is beyond all (and hence all are really human rights)."[12] On this view, of course, even prayers —which one would think was God's right *par excellence*,—becomes

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society's right and enforceable by the society. But the most lethal objection to this stand arises from the fact that, if it is attached to the *materials* of *ḥudūd*, purely arbitrary distinctions come to be drawn between certain comparable crimes. For example, theft is regarded as essentially a violation of a right of society while illegal possession or usurpation (*ghaṣb*) as a crime only against an individual. This dilemma is highlighted by al-Qarāfī by saying that most *ḥudūd Allāh* or Allāh's rights are really for the betterment and moral health of the individual, like those of adultery, theft and false accusation of adultery and yet it is not up to the individual offended against to forgive them and thus they are regarded as Allāh's rights i.e. rights of the society (as distinguished from an individual). "If the individual person (affected by these crimes) were to forgo his claim in all these (cases), his condonement will not be taken into account and his forgiveness will not be effective. Now, all these punishments and their likes are for the welfare of men but they are claims (or rights) of Allāh because they cannot be forgiven because of the forgiveness (of the individual [s] offended against), although these contain welfare of men and ward off evil from them. Most of the Sharī'ah-*ḥudūd* are of this type (i.e. although it is for individual's protection, it cannot be forgiven by him)."[13]

Under the light of this criticism, the entire question of *ḥuqūq Allāh* and *ḥudūd Allāh* assumes a new complexion. First, Allāh's rights are really men's rights or, strictly speaking, rights of society as a whole. This much is stated by other medieval jurists also and restated by modern *Fuqahā'* like Shaykh Shaltūt. But, in the next place, what does "a right of society" mean? It means that there are certain offences whose nature is such that the particular person offended against is no longer in a position to forgive the offender. (We have, of course, pointed out above the anomaly of the position of the crime of murder in Islamic law). This is the real reason behind the *Fuqahā*'s insistence on the invariability of the so-called *ḥadd*-punishments, since they are afraid that if these are interfered with, their *deterrent* force might be dissipated. There is, of course, the added force this stand draws from the fact that certain punishments have been revealed in the Qur'ān, But this is not the real reason ; the real consideration is the idea of deterrence. That the *Fuqahā*'s essential concern is with deterrence and not with the carrying out of *ḥadd*-punishments is also attested by

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'Izz al-Dīn ibn 'Abd al-Salām when he says that the Prophet had ordered, when a certain woman's commission of adultery had been reported to him, that the woman in question should be interrogated —not because the Prophet was very anxious to punish her for this crime but because he wanted to give her the opportunity to prove her innocence and save her reputation. In all alleged crimes, the jurist insists, which affect the reputation of a person, the person in question must be informed (and not merely the court) so that the accused can clear his reputation.[14] This is the basic consideration too, behind Ibn al-Qayyim's view that punishments for *all* crimes lapse when the culprit sincerely repents,[15] for real repentance can occur only after the efficacy of deterrence or reformation. Finally, this also explains the apparent contradiction that we noted in the definition of *ḥadd* in the *Hidāyah*. For the Hidāyah tells us that *ḥadd*, which is *a right of Allāh* and consists of an *invariable quantity of punishment*, is intended to protect people from mischief by providing effective *deterrence. The right of Allāh, then, consists in providing effective deterrence against violation of men's rights—i.e. with regard to their selves, honour and property.*

This is the most hopeful line to approach the question of *ḥadd* and *ḥaqq Allāh* which has needlessly become confused by the entry of several extraneous strands of thought, the essential idea being that of deterrence and reformation. It is because of this fundamental notion that crime of murder was classified by Muslim jurists under an entirely separate concept, viz. that of *qiṣāṣ* or retribution (and compensation, *diyah*). What the *Fuqahā'* were really saying was that whereas retribution or retaliation may be pardoned (*'afw*) or compounded (*muṣālaḥah*), deterrence and reformatory motives are not amenable to this process but only to punishment or repentance. However, as we have pointed out, this classification is not correct and the crime of murder cannot be treated adequately by retribution (retaliation) or compensation alone unless the deterrent-reformatory objective is also and, indeed, primarily fulfilled. Similarly, the contention that punishments revealed in the Qur'ān are, for that reason, to be taken as "fixed, invariable *ḥudūd*" while the rest is all *ta'zīr* (discretionary punishment), cannot be accepted. To begin with, the Qur'ān never calls these punishments "*ḥudūd*" as we have demonstrated in detail. Nor, indeed, does it apply this term with reference to punishment at all. Secondly, as we also pointed out, the punishment for being drunk was laid down neither

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in the Qur'ān nor yet in the Sunnah but was fixed by 'Umar and yet it is included among the foremost *ḥudūd* by 'the *Fuqahā'* (and, significantly, given equal importance in Ḥadīth). Thus, the revelatory basis of the concept of *ḥudūd* stands demolished.

But if we apply the principles of deterrence and reformation, principles which the *Fuqahā'* themselves have enunciated as being basic to the Islamic concept of punishment, we not only restore the original moral position of the Qur'ān on *ḥadd* but avoid all confusion arising from extraneous considerations and would be able to re-classify and systematize the Islamic structure of crime and punishment which would do real justice to the demands of the Qur'ān and Sunnah. This system would be entirely rational as well, which is also something demanded by the Qur'ān and Sunnah. Anomalies and contradictions now teeming in Fiqh-literature would be removed. Among other consequences, the idea of the invariability of *ḥadd*-punishments would be abandoned since it is absolutely extraneous to the concepts of deterrence and reformation which is the declared purpose of the Qur'ān. The crime of murder and allied crimes would be re-classified. The unbridgeable, inordinate and utterly unjustified chasm between the so-called *ḥadd*-punishments and other punishments will be removed. The greasy fictions or devices (*ḥiyal*) with which the *Fuqahā'*—first having needlessly imposed on themselves the ideas of *ḥudūd* and their invariability—felt themselves compelled to restrict and, indeed, neutralize *ḥudūd* will be unnecessary. Such common devices, both legislative and procedural, as tend to render punishments ineffective and encourage crime to go by default, cannot fail to produce an ugly moral laxity in society and moral laxity does not become any the less ugly or injurious because it is concealed. We are not here interested in describing these devices which anyone may find out from the Fiqh-literature. We have been concerned only with discovering a viable and acceptable basis whereupon to build an adequate Islamic structure of punishment. The *Fuqahā'* have given us such a basis in the principles of deterrence and reformation.

NOTES

1. See, for example, *al-Hidāyah*, by Burhān al-Dīn al-Marghīnanī, chapter on *Ḥudūd*; also major philological words like *Lisān al-'Arab*, *s.v.*
2. *Al-Muwaṭṭa'* (of Mālik), Cairo, 1951, vol. II, p. 825.

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3. Al-Shaybānī : *al-Siyar al-Kabīr*, Hyderabad, 1335 (A.H.), vol. IV, pp. 212-214 (also pp. 204-210).
4. *Al-Muwaṭṭa'*, II, p. 826.
5. Al-Shaybānī, op. cit., vol. I, p. 189.
6. Ibid., vol. IV, pp. 209-10.
7. Al-Marghīnanī, *al-Hidāyah*, loc. cit.
8. Commentary published on the margin of *al-Hidāyah*, loc. cit.
9. Maḥmūd Shaltūt, *al-Islām—'Aqīdah wa Sharī'ah*, Cairo (n.d.), p. 300 (also the whole discussion, pp. 292 ff.). Noteworthy is also *al-Tashrī' al-Jinā'iy al-Islāmī* by 'Abd al-Qādir 'Awdah, Cairo, 1963, pp. 204-206, particularly p. 206 where the author states a slightly variant view that in a sense all rights are rights of Allah because the Sharī'ah has been ordained by Him and thus its acceptance is obedience due to Allāh while in another sense all rights are rights of men because all are for human welfare. That is to say, all rights are *formally* rights of Allāh and *materially* rights of men.
10. 'Izz al-Dīn ibn 'Abd al-Salām al-Sulamī, *Qawā'id al-Aḥkām fī Maṣāliḥ al-'Anām*, Cairo (n.d.), part I, p. 163.
11. Ibid., p. 164.
12. Al-Taftāzānī, *al-Tawḍiḥ 'ala'l-Talwīḥ*, Cairo, 1951, Vol. II, p. 151.
13. Al-Qarāfī, *Kitab al-Furūq*, Cairo, Vol. I, p. 181, quoted by Dr. Muḥammad Yūsuf Mūsā in his *al-Fiqh al-Islāmī*, Cairo, 1958, p. 214.
14. 'Izz al-Dīn, ibn 'Abd al-Salām al-Sulami, op. cit., p. 159.
15. Ibn Qayyim al-Jawzīyah, *I'lām al-Muwaqqi'īn*, Vol. II, Delhi, 1314 A.H., p. 17.

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